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COLONIAL REPARATIONS, COLLECTIVE REDRESS AND THE COLONIAL LEGAL SERVICE IN THE POST-WAR BRITISH EMPIREDR. HELEN O'SHEA¹**ABSTRACT**

In the context of current debates surrounding the success of colonial reparations in the case of Kenya, this paper explores the historiography of the complex engagement of the British colonial legal service in counter-insurgency (COIN) operations in the post-Second World War period. It surveys tangential approaches that help shed light on the possible usefulness of exploring the extent to which twentieth century British courts were neutral arbiters of justice or active participants in the various emergency campaigns. Given the complex historical relationship between British courts and the conduct of counterinsurgency campaigns, the paper concludes by questioning the extent to which empirical historical research on the British colonial legal service might feed into the legal arguments for reparations from different national perspectives and help chart the relationship between colonial emergency law and its legacy today. In doing so, the following underscores the utility of using interdisciplinary collaborative approaches connecting history, law and political science.

Key words: British colonial legal service, emergency law and order, Kenya, Hanslope disclosure, reparations, COIN

INTRODUCTION

On 6 June 2013, Foreign Secretary William Hague announced that Britain was to pay out £19.9million in costs and compensation to more than 5,200 elderly Kenyans who suffered torture and abuse during the Mau Mau uprising in the 1950s. While he claimed that the payment was being made as a 'full and final settlement', he stressed that the government continued to deny liability for the actions of the colonial administration (Hague, 2013). Contrary to Hague's assertion, it is anticipated that the recent success of compensation claims for these Kenyan Mau Mau veterans may pave the way for further claims by suspected insurgents and collaborators during COIN campaigns in Malaya, Nyasaland, Cyprus, Aden, Indonesia, Oman and Northern Ireland between the late 1940s and 1970s. Furthermore, with the increasing prominence of emergency law in a post-9/11, post-Arab spring world order struggling to effectively confront Daesh, the philosophical, ethical, legal and practical issues of emergency law are receiving increased attention.

Despite these developments, the legal contexts of the British COIN machinery have yet to be systematically explored, more specifically emergency colonial and post-colonial judicial systems. Despite this however, it is no exaggeration to say that the historiography of the post-war empire has been one of the most rapidly expanding areas of British imperial history. Several factors are behind this shift of interest in imperial studies of which the Kenya reparation case is key. With the historic high court ruling in London in April 2012, resulting in the 'Hanslope disclosure' of over 8,500 previously concealed colonial records dealing with emergency and extraordinary legal measures in 36 colonies, it is anticipated that this material will deepen our understanding of the

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impacts these judicial measures had. This historic case has also opened up new reparation disputes concerning Britain's response to suspected anti-colonial insurgents, and feeds into contemporary debates surrounding British popular perceptions of their imperial past. In these ways, imperial legacies are no longer within the domain of former colonies or in the historical past but are being played out in Britain as a result of the successful Kenyan reparations case in 2013. Led by the human rights legal firm Leigh Day and the Kenya Human Rights Commission, this groundbreaking case, the first of its kind against the former British Empire, was also an example of history on trial. During proceedings, historians David Anderson (2005), Huw Bennett (2012) and Caroline Elkins (2005) served as expert witnesses for the elderly Kikuyu claimants who were subjected to torture and abuse in the detention camps of Emergency Kenya during the 1950s. Their testimonies starkly called into question the validity of the traditional COIN narrative of the use of 'minimal force' and population-centric strategy that still exerts its potency in the British popular and military imaginations. The most comprehensive response to date by historians to the 'Hanslope disclosure' is a special edition of the *Journal of Imperial and Commonwealth History*, published in 2011. Further contributions by Mandy Banton (2012), senior research fellow at the Institute of Commonwealth Studies and a Colonial Office records expert who worked at National Archives at Kew for over twenty years, have shed much light on the various British approaches for the removal of sensitive records of colonial administrations during the era of decolonisation.

THE HISTORIOGRAPHY OF BRITISH POST-WAR COIN

Within the complex web of empire, COIN operations consisted of multi-layered contributions by the colonial police, military, Special Branch and the administration (of which the colonial judiciary was an integral part), each with its own unique identity and institutional memory, each with its own complex legacy. In Kenya, 1090 sentences of execution, passed in the Supreme Court, were carried out by the British administration in Kenya between October 1952 and March 1958 (Anderson, 2005: 353). For Elkins this was a 'startling number of executions, given the often slim evidence offered by the prosecution' (2005: 88). While the emergency regulations from the time of the declaration of emergency on 21 October 1952 were those that were handed down by the Emergency Powers (Colonial Defence) Order-in-Council, 1939, there was, as Anderson notes, 'something compellingly distinctive about the institutional bureaucratisation of war in Kenya' that set it apart from other examples, 'except perhaps for South Africa' (2005: 6). As Anderson expands: 'the war against Mau Mau was fought not just by the military, or by the police, but by the civil administration, in a pervasive campaign that sought to strip the rebels and their sympathisers of every possible human right, while at the same time maintaining the appearance of accountability, transparency and justice. With over 30,000 convicted and sentenced during the Emergency Period, nowhere was this more apparent than in the Mau Mau trials' (2005: 6).

The time period of the Kenya Emergency (1952-60) has played a factor in stimulating these debates as it corresponds with the height of British post-war COIN, a period of vigorous imperial action with a 'revivalist empire' geared towards maintaining its role in the post-war global empire rather than deconstructing it (Jackson, 2007). Aims to initiate what John Darwin (2006) termed the 'fourth' British Empire partly explain the costly counter-insurgency campaigns fought during this era. Conducted, as Jackson has argued, 'most successfully in Malaya...most controversially in Kenya,' and, as the present author has argued elsewhere, 'most forgetfully in Cyprus,' and facilitated by national service in Britain until 1963, it is clear that the advancement of decolonisation was often absent from the intentions of those in British officialdom (Jackson, 2005:

1358; O'Shea, 2015: 5). Though decolonisation, both as a process and an event, would ultimately be influenced by a combination of metricentric, pericentric and international forces, it has also:

proved something of a false scent when attempting to chart Britain's relations with the world in the post-Second World War decades, leading to some awkward anomalies. If empire is defined as the dispensation of power through military, economic, political and cultural means along with juridical control of overseas territory, it might indeed be argued that empire never really ended. Between 1968 and 1984 when, supposedly, Britain had no empire, independence came to Aden, Mauritius, Swaziland, Nauru, Tonga, Fiji, Bahrain, Qatar, the United Arab Emirates, the Bahamas, Grenada, the Seychelles, Dominica, the Solomon Islands, the Gilbert and Ellice Islands, St Vincent and the Grenadines, St Lucia, the New Hebrides, Belize, Antigua and Barbuda, St Kitts and Nevis and Brunei. Hong Kong, with its six million inhabitants, remained British until 1997. Though the use of the term 'British empire' ended, there was no sudden termination of the factors that have conventionally been regarded as imperialism, including the possession of colonies (Jackson, 2005: 1353).

Furthermore, within the historiographies of British decolonisation and COIN that deal extensively with the immediate aftermath of the Second World War until the end of the 'east of Suez' policy in 1968 (Darwin, 2009; Bayly and Harper, 2007; Lynn, 2006; Hyam, 2006; Sinclair, 2006, Newsinger, 2006), accounts of the colonial legal service remain markedly scant, in contrast to the police, military and political dimensions, despite its central role in emergency law and order. This void also stymies inter-imperial comparative work on the various emergency legal systems employed during the decolonisation era. How, say, does the British colonial legal service's derogation from English common law compare with the equivalent shift from continental civil law in the post-war emergencies of the French and Portuguese empires? While valuable comparative approaches to decolonisation exist, these gaps in our understanding remain (Shipway, 2008).

In recent years, with in the context of human rights, the multifaceted impacts of the continuities between pre- and post-independent judiciaries are receiving due attention. There is evidence, according to one working paper exploring the relationship between domestic legal systems, colonial legacies, and human rights to suggest that such comparative attempts might pay dividends:

...there is an interesting puzzle that emerges in recent studies of the legal dimension of human rights. Theoretically, common law states might be expected to have better human rights practices on average than civil law or Islamic law states because common law states tend to have stronger, more independent judiciaries, more powerful lawyers, and more detailed constitutions, all of which create more effective checks against government repression. However, some empirical analyses are at odds with this theoretical prediction, showing that civil law states have better human rights practices than common law states, at least in some contexts such as Sub-Saharan Africa (Keith and Ogundele 2007)...We argue that the relationship between characteristics of domestic legal systems and government repression varies depending on a state's colonial legacy. Using a global cross-national analysis from 1976-2006, we find that among states with colonial legacies, the common law legal system consistently leads to better human rights practices than other legal systems, even when controlling for standard explanations for states' human rights practices. Additionally, although the civil law system can also lead to better human rights practices, its effect is strongest in the subset of states with no colonial legacy. We also find

that states with French colonial legacies have better human rights records than states with other or no colonial legacies (Ring, Mitchell and Spellman, 2009).²

In addressing the extent to which the ‘colonial imposition of an external legal culture upon a conquered or dominated nation or region continued after twentieth-century political independence,’ Shmidhauser has found that:

The persistence of economic penetration and legal imperialism after independence is perhaps the most striking characteristic of the post-World War II era. Several indicators of the persistence of legal imperialism are tested utilizing virtually the total universe of nations in existence (or recently in existence) in the 1980s - 142 judicial systems and legal professions. While 115 (81 percent) of a universe of 142 nations have indigenous law schools or their equivalents, 74 (52 percent) provide legal training similar to that of the former colonial nation and 11 (8 percent) have their legal professionals trained in the former colonial nation. Similarly, 106 (74.6 percent) have adopted a legal system similar to that of their colonial nation (2001: 331).

These observations are not intended to downplay the value of security-focused contributions, for instance, recent revisionist interventions suggest that, ‘the dominant paradigm in studies of British small wars positing a central role of minimum force in doctrinal guidelines for counterinsurgency needs to be even more fundamentally revised than has been argued in recent debates...minimum force is nowhere to be found in British doctrine during the small wars of decolonisation’ (Reis, 2011: 247). As Reis outlines, any ‘significant revision of the dominant analysis of British counterinsurgency during this period therefore has important implications not only for the historical record regarding doctrine in specific decolonisation campaigns but also for our understanding of counterinsurgency...[and] should make us question whether present attempts to emulate past British successes in counterinsurgency have a solid historical basis’ (2011:247).

THE KENYAN COMPENSATION CASE AND REPARATIONS DEBATE

Moreover, this has potentially much wider implications in light of the successful Kenyan compensation case. If, as French has argued (2011), this force was legitimised by what he terms the ‘veneer of legality’ then to effectively understand the former, we also need to understand the latter despite the tendency within the historical and legal disciplines to treat as independent each of these arms of the COIN machinery. This is nothing new. Mark Mazower, writing on the ‘strange triumph’ of human rights between 1933 and 1950, has claimed historians ‘have allowed the vagaries of intellectual fashion, and a perhaps well-founded fear of treading on lawyers’ toes, to turn the history of law into a ghetto in historical studies while the history of how law has been deployed in international politics remains a ghetto within a ghetto’ (Mazower, 2004: 380). Arguably, these sentiments could be extended to include British imperial historiography of the latter half of the twentieth century in its treatment of issues surrounding emergency law and its use, impacts and legacies in COIN operations. The key exceptions here in the context of post-war COIN in Kenya include the work of David French, David Anderson and Caroline Elkins. Elsewhere, historical and legal scholarship has focused on the ramifications of the Devlin Commission Report (1959) on the handling of law and order in Emergency Nyasaland (Simpson, 2002).

² In the economic sphere, recent work has shown that the identity of the former imperial power is a better predictor of post-colonial growth rates than legal origin. See D. M. Klerman et al. (2011) Legal origin or colonial history. *Journal of legal analysis*, 3, 379-409.

While it is widely accepted that the criminal law of nearly all of the states that were once part of the British Empire, and for its remaining overseas territories, remains based on colonial law, the evolution and legacy of emergency legislation, and its implications for the future, have yet to be comprehensively explored in twentieth century colonial and post-colonial judicial systems.³ A survey of the existing body of scholarship shows that this can be contrasted with the substantial body of legal historical and theoretical work focusing on the role of legal interpretation, local understandings, judicial biography and legal cultures in regional, national and transnational legal dimensions of the British imperial project that has come to fruition in recent years (Smandych, 2010; Foster, Berger and Buck, 2008; Wiener, 2009; Kostal, 2005; Hussain, 2004; Benton, 2002; Chanock, 1985). While many of these contributions have predominantly focused on the long nineteenth century in the white settler colonies and South East Asia, more recent collections highlight the utility of a wider geographical investigative reach (Dorsett and McLaren, 2014; Benton and Ross, 2013; McLaren, 2012).

Many of these valuable works underscore the crisis of liberal imperialism during the latter half of the nineteenth century, exposing the tensions and paradoxes between the centrality of the 'civilising mission' with its ideal of equality under law and the reality of racial inequality. These themes continued to resonate in the latter half of the twentieth century with the contradictions between the increasing prominence of the rhetoric of universalism and human rights on the international stage (following from the United Nation's Universal Declaration in 1948, the 1949 Geneva Conventions and the European Convention of Human Rights in 1950) and the expedient realities of COIN in British colonial hotspots. However, legal histories of this latter period remain relatively scant (though their potential ramifications, in the context of the Cyprus Emergency, were to be pursued by the Greek government at the European Court of Human Rights).⁴ It remains to be seen if the Kenyan case will pave the way for other success stories or will indeed reflect Hague's assertion of it constituting a 'full and final settlement' despite the contention of human right campaigners, such as Peter Tatchell, that Britain has a duty to compensate all victims of colonial repression (Tatchell, 2013).

The Kenyan case was clearly a bellwether. In Malawi, the families of over thirty anticolonial protesters killed in March 1959 during the Nyasaland Emergency have reportedly said their decision to sue was inspired by the Kenyan success of legal action (Mapondera, 2015). While this case is ongoing, on 25 November 2015, campaigners calling for a judicial review challenge to the verdict of earlier official investigations into the alleged massacre of twenty-four Malaysian rubber plantation workers by British troops during the Malayan Emergency in December 1948, otherwise known as the 'Batang Kali massacre,' lost their battle at the Supreme Court (Bowcott, 2015). However, the majority decision by the court that 'the duty to investigate dates to only a 10-year grace period before 1966, when the right of individual petition to the European court of human rights was introduced,' may have profound consequences for inquiries into Northern Ireland's Troubles (Bowcott, 2015). Despite the force and fear used as part of British post-war COIN tactics, similar claims, even where the claimants are still alive, have a low chance of success. While the Kenyan case may have set a precedent, the watermark for overcoming the statute of limitations is set extremely high, as is the expert forensic analysis required while the depth and breadth of

³ One contribution that indirectly acknowledges the links between colonial and postcolonial emergency powers is V.V. Ramraj and A.K. Thiruvengadam (eds.) (2009) *Emergency powers in Asia: exploring the limits of legality*. Cambridge: Cambridge University Press.

⁴ Both of these inter-State applications (176/56 and 299/57) were wound up due to the London-Zurich Agreement in February 1959. For more on these test cases, see A.W.B. Simpson (2004) *Human rights and the end of empire: Britain and the genesis of the European convention*. Oxford: Oxford University Press, 924-1052.

revisionist scholarship on Kenya documenting the violence at the end of empire is not currently matched elsewhere.

The legal claims go further than the field of reparations however. Further investigations following the ‘Hanslope disclosure’ of 8,800 files led to the eventual acknowledgement of what the government has termed the ‘special collections’ which consists of over 1.2 million historical files that remain unlawfully held at Hanslope Park in Buckinghamshire, home to the Her Majesty’s Government Communications Headquarters (GCHQ). In light of this discovery, Leigh Day is now pursuing a case against the Foreign and Commonwealth Office on behalf of some of Britain’s most distinguished historians - Professors David Anderson, Richard Drayton, Margaret MacMillan, Richard Evans and Christopher Bayly - for allegedly failing to comply with their statutory obligations under the Public Records Act (1958) and the Freedom of Information Act (2000). Their aim is to secure guarantees from the government that fully address how they plan to make the documents public and to ensure the provision of an appropriate timescale for their release that comply with the statutory obligations. As Professor Anthony Badger has noted, ‘it is difficult to overestimate the legacy of suspicion among historians, lawyers and journalists’ resulting from the attempted suppression of the 8,800 files used in the Kenyan case, now known as the ‘migrated archive’ and held at the National Archives since declassification. It has been estimated that the ‘special collections,’ if declassified at the same rate as the ‘migrated archive,’ could take up to 340 years, ironically longer than the existence of the modern British Empire itself (Cobain, 2013). While the content of these documents may or may not be of potential value to other reparation claims, nonetheless, as Elkins has observed, ‘Britain has said sorry to the Mau Mau. The rest of the empire is still waiting’ (Elkins, 2013).

While it is clear that the Kenyan case has stimulated British journalistic interest in the turbulent endgame of empire, it remains doubtful if this has been matched by increased public interest or historical awareness of this period.⁵ Perhaps it is too soon to tell. The anachronistic use of British imperial history and, until very recently, the largely uncritical acceptance of the post-war COIN narrative has stymied informed debate in the past. However, at the time of writing, over 100 academics in Britain had signed up to support a letter to Prime Minister David Cameron calling for the launch of a Commission of Inquiry into the Teaching of British Colonialism and the British Empire in UK Schools and Universities. Elsewhere, activist groups such as History Matters, the Black and Asian Studies Association and Justice2History continue to campaign for a more inclusive history curriculum. The debate surrounding the ‘Rhodes Must Fall’ campaign at the University of Oxford and campuses elsewhere may also lead to further reassessments of the longer imperial past and its legacies.⁶

⁵ The most recent YouGov poll, conducted on 17-18 January 2016 with a sample size of 1733 British adults, found that attitudes towards the British Empire tended to be positive. 43% of respondents considered the British Empire ‘a good thing’ and 44% felt that Britain’s history of colonialism was ‘something to be proud of.’ 19% of respondents felt that the empire was ‘a bad thing’ and only 21% regretted historic colonialism. A full breakdown of the YouGov results are available at <https://yougov.co.uk/news/2016/01/18/rhodes-must-not-fall/> [Accessed 14 February 2016].

⁶ The longer historical period too is also receiving increased attention in Britain the context of slavery reparations as can be seen by the invitation of Professor Sir Hilary Beckles, chairman of the Caribbean Community (Caricom) Reparations Committee (CARICOM) to present his model for reparations at the University of Oxford on 26 January 2016 and previous to this at the Repairing the Past, Imagining the Future: Reparations and Beyond Conference at University of Edinburgh on 6 November 2015.

FUTURE DIRECTIONS

Two groundbreaking collections of recent interdisciplinary scholarship in empire studies bridging the fields of history, politics and international relations include *Legacies of Empire: Imperial Roots of the Contemporary Global Order* (Halperin and Palan, 2015) and *Echoes of Empire: Memory, Identity and Colonial Legacies* (Nicolaidis, Sebe and Maas, 2015). Other promising indications, reflected by the topics covered in recent, though yet unpublished, theses may be indicative of a greater shift in interest on the socio-legal and historical aspects of emergency law in the post-war British Empire (Reynolds, 2011; Feingold, 2011; Swanepoel, 2010). It is the contention of this author that a similar approach, combining empirical historical research of British colonial emergency law with socio-legal studies, under a broad church would also prove fruitful for academics, practitioners and citizens interested in the burgeoning debates about emergency powers, the evaluation of their moral, political and legal considerations and fears surrounding their assimilation into liberal constitutional democracies today (Gross and Ní Aoláin, 2006; Wilde, 2005). Given that specific legal structures, such as emergency law, emerge from socio-political contexts, they cannot be understood as simply the application of legal theory just as the power of the emergency colonial state cannot be properly understood without including local perspectives and experiences. We still know relatively little about the interconnections between the ‘force of law’ and the ‘law of force’ in the post-war British Empire. Rethinking emergency colonial legal histories in these ways might also contribute to potentially beneficial joined-up thinking in the context of present and future reparation developments. If anything, the Kenyan reparations case has shown the importance of the interconnections between Britain’s ‘small wars’ in particular historical settings and their potential impact on the revision of Britain’s imperial master narratives.

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